Supreme Court of the United States

OCTOBER TERM, 1966

No. 831

FRANCIS EDDIE SPECHT, PETITIONER

vs.

WAYNE K. PATTERSON, WARDEN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

[fol. 1]

PETITION FOR WRIT OF HABEAS CORPUS
UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

PERSONS IN STATE CUSTODY

Pursuant to Sentence Imposed in a Criminal Action

Case No. ———

[File Endorsement Omitted]

FRANCIS EDDIE SPECHT, (Colorado State Penitentiary Register Number 32140), (Colorado State Hospital Case Number 42871), PETITIONER

vs.

HARRY C. TINSLEY, Warden, Colorado State Penitentiary,

and/or

DR. CHARLES E. MEREDITH, Supt., Colorado State Hospital, RESPONDENTS

PETITION FOR WRIT OF HABEAS CORPUS—
Filed March 31, 1965

1. Place of detention: Colorado State Hospital, Pueblo, Colorado, having been transferred from the Colorado State Penitentiary, Canon City, Colorado, on the date of May 4, 1964.

2. Name and location of court which imposed sentence: Jefferson County District Court, Golden, Colorado, Colorado 1st Judicial District.

3. The case number in which, and the offense for which, sentence was imposed: Criminal Action No. 2667; the charge was Indecent Liberties.

4. The date upon which sentence was imposed: November 23, 1959; sentenced on one count only.

5. A finding of guilty was made after a plea of not guilty.

6. The finding of guilty after a plea of not guilty was made by a jury.

7. Petitioner did not appeal from the judgment of conviction or the imposition of sentence.

8. Answered by (7).

9. If you answered "no" to (7), state your reasons for not so appealing: Counsel for petitioner misinterpreted [fol. 2] the possible results of C. R. S. '53, 39-19-1 and 39-19-2 (1960 Perm. Supp.). Counsel stated that "An appeal would be useless to you at this point (Nov. of 1959) because you will be free before such an appeal could be heard under the sentencing terms".

10. State concisely the grounds on which you base your allegations that you are being held in custody unlawfully:

(a) Petitioner was sentenced pursuant to the Colorado Sex Offenders Act (C. R. S. '53, 39-19-1 and 2; 1960 Perm. Supp.), although he was charged, tried and convicted pursuant to C. R. S. '53, 40-2-32, only; petitioner also was tried, charged and convicted on a completed act and an attempt in the same count of the Information; all of which is in violation of petitioner's rights to equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article II, Section 25 of the Colorado Constitution.

(b) Sentencing under the Sex Offenders Act is cruel and unusual punishment within the Eighth Amendment to the Constitution of the United States and Article II, Section 20 of the Colorado Constitution.

(c) Article III of the Colorado Constitution prohibits sentencing under the Sex Offenders Act, because the said Act unlawfully delegates legislative power to the judiciary and unlawfully delegates power to the Executive Branch (The Colorado State Board of Parole) of the state government in violation of due process of law under the Fourteenth Amendment to the United States Constitution.

(d) Sentencing under the Sex Offenders Act violates petitioner's rights to equal protection and due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article II, Section 25 of the Colorado Constitution.

(e) Petitioner has been held under unlawful and illegal restraint since the date of October 15, 1964, date of the maximum sentence possible under the crime with which he was charged, tried and convicted, in violation of equal protection and due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article II, Section 25 of the Colorado Constitution.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

[fol. 3] PREFATORY STATEMENT

Petitioner is in physical custody of Respondent Meredith, having been transferred to the Colorado State Hospital from the Colorado State Penitentiary on May 4, 1964; petitioner is in technical custody of Respondent Tinsley as petitioner was originally sentenced to the penitentiary; the transfer of petitioner was effected by Executive Order.

Attached to this brief and made a part hereof are the following: The Opinion Below, *Specht* v. *People*, (citation unknown), Colorado State Supreme Court Case No. 21260, decided November 14, 1964, marked Exhibit A; Denial of Petition for a Writ of Mandamus, marked Exhibit B; the jury verdict in the original case, Criminal Action No. 2667, Jefferson County District Court, State of Colorado, marked Exhibit C; and Denial of Petition for Re-Hearing in Colorado Supreme Court Case No. 21260, marked Exhibit D.

(a) Petitioner was charged, tried and convicted pursuant to an Information couched in the general language of C. R. S. '53 40-2-32 (Exhibit A, p. 2); he was sentenced pursuant to C. R. S. '53, 39-19-1 and 39-19-2 in the Minute Order of Sentence in the

case, this being the first two sections of the so-called Sex Offenders Act. C. R. S. '53, 40-2-32 carries no minimum and a maximum of ten years imprisonment; the Sex Offenders Act carries a minimum of one day and a maximum of life. Petitioner has previously brought up in all pleadings the mandate of C. R. S. '53, 39-12-1, which has consistently been ignored by the several Courts of Colorado. This reads, in pertinent part:

> "When a convict is sentenced to the state penitentiary, otherwise than for life, the court imposing the sentence shall not fix a definite term of imprisonment, but *shall* establish a maximum and minimum term of imprisonment. *The maximum term shall not be longer than the longest term fixed by law for the punishment of the offense of which he was convicted,* * * *." (Emphasis added.)

This statute was in full force and effect at the time of sentencing of petitioner and is in full force and effect today, not having been amended or altered in any way. The trial Court invoked the terms of C. R. S. '53, 39-19-1 (1960 Perm. Supp.) to apply the Sex Offenders Act to petitioner. It has been the contention of petitioner that the trial Court lacked authority to exercise its discretion and apply a sen-
[fol. 4] tence procedure to him carrying a far greater maximum than that of the crime with which he was charged, tried and convicted. Further, C. R. S. '53, 39-19-1 et seq. (1960 Perm. Supp.) carries a life maximum for four different crimes carrying a maximum of 10, 14, 20 and 20 years respectively. This very obviously is not equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States. Further, it is settled case law in Colorado that one has a right to be tried on the offense in the Information and no other. *Gill* v. *People*, 139 Colo. 401, 339 P. (2d) 1000, at 416 (Colo.); *Stull* v. *People*, 140 Colo. 278, 344 P. (2d) 455, at 283 (Colo.); and *Ciccarelli* v. *People*,

147 Colo. 413, 364 P. (2d) 368, at 417 (Colo.). The Attorney General of Colorado, in *Specht* v. *Tinsley*, —— Colo. ——, 385 P. (2d) 423, made the following admission in his Answer Brief, at page 3: "It is clear that * * * he (petitioner) was sentenced pursuant to the sex offenders act, *which act does not contemplate a charge, trial or conviction*, * * *." (Parenthetical word and emphasis added.) No more need be said, in the opinion of petitioner, as to lack of due process of law, even though this particular admitted point was not ruled upon in the decision.

Petitioner is a layman and does not have access to a large reference law library. The point that one cannot be convicted of both an attempt and a completed act in the same transaction was not readily available to him when he first started court proceedings in an attempt to secure a proper adjudication of his rights. However, it has been settled case law in Colorado for many years that one cannot be found guilty of both enticement and attempting to take immodest, immoral and indecent liberties, and enticement and taking immodest, immoral and indecent liberties. *Martinez* v. *People*, 111 Colo. 52, 137 P. (2d) 690, reaffirmed in *Lewis* v. *People*, 124 Colo. 62, 235 P. (2d) 348. In the Opinion Below (Exhibit A), the Colorado Supreme Court admits this fact but emphasizes the fact that The People can *charge* an accused with the two offenses, but that one cannot be found *guilty* of both an attempt and a completed act. It is rather amazing that the Court did recite the Information in the cause almost verbatim, omitting extraneous wordage (Exhibit A, p. 2) and then did render the opinion that it did. It was admitted that: "* * * it is true that the information charged [fol. 5] three offenses in *one* count * * *." (Emphasis added; Exhibit A, p. 5). It was further admitted: "* * * and (2) it charges three offenses in *one* count." (Emphasis added; Ex. A, p. 4). It is thus established that among the three offenses were: (1) enticement and *attempting* to take immodest * * * liberties, and (2) enticement and *taking* immodest * * * liberties.

On page 5 of Exhibit A, it is said: "The record discloses neither a timely objection, * * *"; so it is quite evident that the record in the case was before the Supreme Court at the time of deliberation of the issues. However, for the benefit of this Honorable Court, petitioner has obtained a certified copy of the jury's verdict, marked Exhibit C, which discloses that petitioner was "guilty as charged". From the foregoing it is patent that petitioner has been denied Equal Protection of the Laws under the Fourteenth Amendment to the United States Constitution and Article II, Section 25 of the Colorado Constitution under the cloak of Colorado case law that has stood the test of time. *Martinez* v. *People*, supra, and *Lewis* v. *People*, supra, have neither been overturned; in fact, *Martinez*, supra, was reaffirmed in the Opinion Below (Exhibit A).

Despite the fact that the Opinion Below was an *en banc* decision of the Colorado Supreme Court and no petition for re-hearing was necessary, petitioner did file for the same in order to give the Colorado Supreme Court an opportunity to correct its erroneous decision, pointing out specifically in the record where he had argued that he had been *charged*, tried and *convicted* of an attempt and a completed act in the same transaction, contrary to long-standing rulings of the Colorado Supreme Court. This was denied by the Colorado Supreme Court (Exhibit D). It appears that the several Courts of Colorado are engaged in an attempt to keep the petitioner on a legal merry-go-round on technical issues that will not stand searching scrutiny.

From the facts set forth above, the Writ of Habeas Corpus should issue and be made absolute.

(b) Petitioner makes the contention that the Colorado Sex Offenders Act (C. R. S. '53, 39-19-1 et seq., 1960 Perm. Supp.) is in violation of the Eighth Amendment to the United States Constitution and Article II, Section 20 of the Colorado Constitution. Both are verbatim and relate to "cruel and unusual punishments". The Eighth Amendment was made

[fol. 6] applicable upon the States by reason of the Due Process Clause of the Fourteenth Amendment in the celebrated opinion of Mr. Justice Stewart in *Robinson* v. *State of California*, 82 S. Ct. 1417 (decided June 25, 1962). The classification found in C. R. S. '53, 39-19-1 (1960 Perm. Supp.) states that the trial court may, in its discretion, dismiss any one of the charges of which a person has been found guilty if, *in the opinion of the trial court*, such person poses a threat of bodily harm to the public, if at large, or is an habitual offender *and* mentally ill. (Emphasis added). The first classification is standard for anyone standing before the Bar. The second part is intertwined as one classification by use of the word, "and". It is needless to expound on the classification of "an habitual offender" as this does not and cannot apply to petitioner. The use of the term, "mentally ill", is of paramount importance relative to a claim of abridgment of rights existing under the Eighth Amendment. Under C. R. S. '53, 39-19-1 (1960 Perm. Supp.), a mere "finding of fact" by one man, the trial Court, is all that is required to declare a man to be "mentally ill" in Colorado! There is no hearing in open court; one cannot question adverse witnesses; no reports are open to him. It is admitted that petitioner did have an examination period (required under C. R. S. '53, 39-19-2) at the Colorado Psychopathic Hospital, but the reports of the doctor(s) or psychiatrist(s) were never made available to petitioner; he was unable to cross-examine the psychiatrist(s) in the case. In Court, counsel for petitioner and the District Attorney were reading the Hospital's report; petitioner attempted to read the same over his counsel's shoulder; the Court, the Hon. Marshall Quiat, admonished petitioner: "Mr. Specht, that report is solely for your counsel and the District Attorney!" Behind this legal iron curtain of secrecy, petitioner was then sentenced pursuant to C. R. S. '53, 39-19-1 and 2 (1960 Perm. Supp.).

It has been the contention of various legal authorities of Colorado that the trial Court does not deter-

mine the "classification" that such is laid out in the Act and the trial Court merely makes a finding of fact to determine whether the convicted person comes within the purview of this "classification". In our humble opinion, a "classification" must be proved in open court, such is done after a person is charged with being an habitual criminal; further, a "finding [fol. 7] of fact" is but the opinion of one man, unsupported by any legal authority to sustain its findings. It is the contention of petitioner that such an important question whether a person is mentally ill or not is not a proper question to be left to the determination of the trial Court under the aegis of a "finding of fact". This is a violation of safeguards guaranteed by the Due Process Clause of the Fourteenth Amendment. A short citation from *Robinson* v. *California*, supra, is apropos at this point to sustain petitioner's claim, at a point where Mr. Justice Stewart stated, at page 1420 (S. Ct.):

> "It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person *to be mentally ill*, a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare required that the victims of these and other afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, *a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.* See *State of Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 67 S. Ct. 374, 91 L. Ed. 422." (Emphasis added.)

Mr. Justice Douglas, concurring in *Robinson* v. *California*, supra, had this to say at p. 1425 (S. Ct.):

> "The command of the Eighth Amendment, banning 'cruel and unusual punishments', stems

from the Bill of Rights of 1688. * * * And *it is applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment.* Ibid." (Emphasis added.)

Under the express terms of C. R. S. '53, 39-19-1 (1960 Perm. Supp.), petitioner has been sentenced as "an habitual offender and mentally ill"; yet he spent more than four years in the Colorado State Penitentiary, all such time being purely punitive and as if he were sentenced under a criminal offense and none other! Petitioner maintains that this is a cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments of the United States Constitution and Article II, Section 20 of the Colorado Constitution.

This question has been before the Colorado Supreme Court twice, in *Specht* v. *Tinsley*, supra, and in the Opinion Below (Ex. A), and has brushed aside preemptorily any adjudication on this question, retreating behind their opinion in *Trueblood* v. *Tinsley*, 503, 366 P. (2d) 655, of which more will be laid out specifically under (d) hereunder.

(c) Article III of the Constitution of Colorado states:

[fol. 8] "The powers of the government of this state are divided into three distinct departments,—the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted."

Under C. R. S. '53, 40-2-32, the legislature of the State of Colorado enacted a law creating and defining the crime of Indecent Liberties with the maximum penalty set, upon conviction, at ten years in the state penitentiary. Then, the General Assembly of Colorado, in C. R. S. '53, 39-19-1 et seq. (1960 Perm. Supp.), has confided in the trial court alone, by a

"finding of fact", the power to determine whether a convicted person shall be subject to a maximum of of ten years or life in the state penitentiary. This obviously confers power upon the judiciary which lies in the legislative branch of the state government, in violation of Article III of the Colorado Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The very point raised by petitioner has been ruled upon favorably by the Colorado Supreme Court in a fairly late decision. In *Dominguez* v. *Denver*, 147 Colo. 233, 363 P. (2d) 661, it is said, at 237 (Colo.):

> "Legislation which provides 'an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of' the legislative body satisfies the constitutional requirements. *United States* v. *Petrillo*, 332 U. S. 1, 67 S. Ct. 1538, 91 L. Ed. 1877. Language which gives sufficient *notice* to the person and furnishes guides for the adjudicative process meets the test of definiteness.
>
> "But indefiniteness which leaves to officer, *court* or jury the determination of standards in a *case-by-case process invalidates legislation as being violative of due process, as contravening the mandate that an accused be advised of the nature and cause of the accusation, and as constituting an unlawful delegation of legislative power to courts or enforcement agencies. United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81. 41 S. Ct. 298, 65 L. Ed. 516. See *People* v. *Lange*, 48 Colo. 428, 110 Pac. 68; *Olinger* v. *People*, 140 Colo. 397, 344 P. (2d) 689." (Emphasis added.)

The legislative power is further extended to the executive branch of the state government, whereby under C. R. S. '53, 39-19-1 et seq. (1960 Perm. Supp.) complete power of the Colorado State Board of Parole

is exercised to determine how long, where, or when a person convicted under C. R. S. '53, 40-2-32 shall remain in confinement, although C. R. S. '53, 40-2-32, under which petitioner was charged, tried and con-
[fol. 9] victed calls for a *maximum* of ten years in the state penitentiary, made mandatory by the express terms of C. R. S. '53, 39-12-1, supra. Further, Article III of the Colorado Constitution provides that no one department of the state government shall exercise powers properly belonging to any of the two other departments "except as in this constitution expressly directed or permitted". The provisions of C. R. S. '53, 39-19-1 et seq. (1960 Perm. Supp.) are statutory, as are the statutes granting power to the Colorado State Board of Parole to determine how long and where a convicted person shall serve the indeterminate sentence stated in C. R. S. '53, 39-19-1 et seq. (1960 Perm. Supp.). These provisions are *not* expressly provided for anyplace in the Colorado Constitution.

The several Courts of Colorado, in brushing aside the claim that legislative power is unlawfully conferred upon the other branches of the Colorado State Government, refuse to look at their own rulings that sustain petitioner's claims. It is respectfully submitted that petitioner's rights existing under the Due Process Clause of the Fourteenth Amendment to the United States Constitution have been abridged not only once, but several times by the procedures entered upon.

In *Dominguez* v. *Denver*, supra, petitioner emphasized the reference to proper notice. Such was not given in this case by application of C. R. S. '53, 39-19-1 et seq. (1960 Perm. Supp.). Notice under due process of law is described in 16A C. J. S. 619, Sec. 579:

> "Due process of law in a criminal case *requires a law creating or defining the offense*, a court of competent jurisdiction, accusation in due form, *notice* and opportunity to defend, trial before an

impartial judge or jury according to established criminal procedure, and a right to be discharged unless found guilty. Where these conditions are fulfilled, there is no violation of the guaranty of due process of law. * * *" (Emphasis added.)

One of the inalienable rights under the Sixth Amendment to the Constitution of the United States is aptly described in the general rule found in 16A C. J. S., "Constitutional Law", 572, Section 569 (4):

"Due process of law has been held to mean the right to be heard. So, its essential or indispensable elements, or, according to other authority, its absolute fundamentals, or minimal requirements, are *notice* and opportunity to be heard or to defend. *The legislature is without authority to dispense with these requirements of due process;* * * *." (Emphasis added.)

The procedures described herein on page 6 at the time of sentencing of petitioner violate all of the precepts of due process and notice as given in the general rule, above. It is respectfully submitted that this [fol. 10] is in violation of the Sixth Amendment to the Constitution of the United States, made applicable upon the States by reason of the Fourteenth Amendment. *Gideon* v. *Wainwright*, 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, (at p. 797, S. Ct.).

(d) The question whether sentencing under the Sex Offenders Act of Colorado violates petitioner's right to equal protection and due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article II, Section 25 of the Colorado Constitution has been before the several Courts of Colorado in *Specht* v. *Tinsley*, supra, and *Specht* v. *People* (Exhibit A, the Opinion Below); it has also previously been before this Honorable Court in *Specht* v. *Tinsley* (citation unknown), Civil Action No. 8288, U. S. D. C. Colo., decided January 30, 1964. The Hon. Alfred A. Arraj appointed the Hon. William D. Swenson as counsel for petitioner in the

prior hearing. The Office of the Attorney General successfully argued before this Court that the constitutional questions, especially the one under this heading, had not been presented to the several Courts of Colorado for adjudication in the form presented to this Honorable Court. Petitioner admits that he could have strayed from the strict path of argument in his opening brief to this Court and that the questions could have been presented in different form. Mr. Swenson also did a tremendous job of research on points suggested by petitioner and these also, conceivably, could not have been presented in the same form.

Petitioner thereupon did present the specific questions to the several Courts of Colorado, starting with a Motion to Vacate, Set Aside or Correct Judgment and Sentence, Pursuant to Rule 35 (b), Colo. R. Crim. P., in the District Court for Jefferson County, State of Colorado, in Criminal Action No. 2667. This was denied in due time and a Writ of Error was taken to the Supreme Court of Colorado in Case No. 21260 (Exhibit A; the Opinion Below). In every instance, the Courts of Colorado have retreated behind their opinion in *Trueblood* v. *Tinsley*, supra. The Colorado Courts have consistently refused to reexamine their findings in that case, but merely reaffirm their findings therein.

Petitioner cites the following from *Trueblood* v. *Tinsley, supra*, at p. 509 (Colo.):

> "Statutes *similar* to the one under consideration have been held not repugnant to the equal
> [fol. 11] protection provision. *State* v. *Evans*, 73 Ida. 50, 245 P. (2d) 788; *Minnesota* v. *Probate Court*, 309 U. S. 270, 60 S. Ct. 523, 84 L. Ed. 744, 126 A. L. R. 530. * * *" (Emphasis added.)

The statutes under consideration are C. R. S. '53, 39-19-1 et seq. (1960 Perm. Supp.). It has been the consistent claim of petitioner that the statutes cited from the States of Idaho and Minnesota *are not similar* to the Colorado statutes. *Trueblood* v. *Tinsley*,

supra, was a case of first impression in Colorado and the Colorado Supreme Court had to sustain its findings by rulings of sister States.

Petitioner has discovered an Act in Michigan very similar to that of Colorado—in fact, the only *similar* Act that we have been able to find—with the said Act being declared unconstitutional in the case of *People* v. *Frontczak*, 286 Mich. 51, 281 N. W. 534. In the ruling thereon, Mr. Chief Justice Wiest delivered the opinion and said, at p. 58 of 286 Mich., p. 536 of N. W.:

> "We must class it where we find it placed by its authors, and we find it in the mentioned criminal code chapter relating to judgments and sentences in criminal cases.
>
> "The attorney general contends that it is a civil proceeding and analagous to statutory inquests relative to insane prisoners, which is civil in nature.
>
> "It is obvious that in such instances the inquest bears no relation to the conviction; jurisdiction attaches because of insanity. In the instance at bar jurisdiction is not given until after conviction and the prisoner is averred to be sane and *change in confinement under sentence is contemplated, for, while undergoing hospitalization, he gets credit on his sentence.*
>
> "Hospitalization, with curative treatment and measures may be desirable but, until the law makes a sane person amenable to complusory restraint as a sex deviator, *it falls short of due process in merely providing procedure.*
>
> "Under this act defendant is under sentence for an overt sex deviation offense and, as a potential like offender, it is sought to keep him in confinement under exercise of the police power. The police power, under such circumstances, is not a civil proceeding, comparable to that in cases of insane persons." (Emphasis added.)

The Act in *Frontczak* under attack was Act No. 196, Sec. 1b, Pub. Acts 1937, Comp. Laws Supp. 1937,

Sec. 17329-2, Stat. Ann. 1938, Cum. Supp. Sec. 28.1073(1). Michigan thereupon enacted a new Act known as Michigan Penal Code, Act No. 328, Sec. 338, Pub. Acts 1931, Comp. Laws Supp. 1940, Sec. 17115-338, Stat. Ann. Sec. 28.570. This new law was attacked in *People* v. *Chapman*, 301 Mich. 584, 4 [fol. 12] N. W. (2d) 18, and held to be constitutional. It should be noted that the new law in Michigan is very similar to the Act in Minnesota, recorded in *Minnesota* v. *Probate Court*, supra. The conditions of the Act in Michigan are laid out in *People* v. *Chapman*, supra, at p. 21 (4 N. W. 2d). In Minnesota, the statute under consideration was Chapter 369 of the Laws of Minnesota of 1939, with pertinent portions of the Act being laid out by the Supreme Court of the United States in *Minnesota* v. *Probate Court*, supra, at p. 272 (U. S.), p. 525 (S. Ct.). Jurisdiction attaches *before* any criminal offense is tried or a conviction obtained; the proceedings are civil in nature; all constitutional safeguards are provided to an accused at all stages of the proceedings in both Minnesota and Michigan. These procedures are *not* similar to the Colorado Sex Offenders Act, where jurisdiction attaches *after* conviction on a criminal charge with the application of the Act being left to the discretion of the District Court. In Minnesota, it is to be noted that an accused is referred to as a "patient".

In *State* v. *Evans*, supra, the act in Idaho was held to be constitutional by virtue of the fact that the District Court could, in its discretion, sentence an offender to "less than life". Petitioner does know that the argument will immediately be propounded that the Colorado Sex Offenders Act does not provide for a "mandatory life sentence" but that the offender is sentenced from "one day to life". Who is to gainsay, under the procedures engaged in in Colorado that a sentence of from "one day to life" does not mean the latter—especially where there is no recourse to any constitutional safeguards to a person so sentenced?

In Illinois, much the same procedure is afforded a person charged with being a sexually dangerous person. Illinois Code of Criminal Procedure 1963 (effective Jan. 1, 1964), Chap. 38, Sections 105-1 thru 105-12 lists procedures much the same as those found in Chapter 369 of the Laws of Minnesota of 1939, supra. It is pertinent to note that Chapter 38, Section 105-3.01 of the Illinois Code of Criminal Procedure, 1963, specifically states that the procedure is in the nature of a civil proceeding. This Act was attacked on constitutional grounds and upheld in *People ex rel. Turnbaugh* v. *Bibb*, 252 F. 2d 217. Again, this Act is similar to the Minnesota and Mich-
[fol. 13] igan Acts, whose constitutionality have been upheld; the foregoing is not to be confused with the Act declared unconstitutional in Michigan. *People* v. *Frontczak*, supra. The conditions stated in *People* v. *Frontczak*, supra, oddly parallel events as they have occurred in petitioner's case. Procedure is all that is provided in the Colorado Sex Offenders Act and, as said in *Frontczak*, "it falls short of due process in merely providing procedure".

Petitioner respectfully submits that C. R. S. '53, 39-19-1 et seq. (1960 Perm. Supp.) is, and must be declared, unconstitutional; that the Supreme Court of Colorado, by its failure to re-examine its findings in *Trueblood* v. *Tinsely*, supra, has denied to petitioner due process and equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States; that any truly *similar* Act to that of Colorado's Sex Offenders Act must be declared to be unconstitutional in the light of the ruling in *People* v. *Frontczak*, supra.

(e) Petitioner has been held under unlawful and illegal restraint since the date of October 15, 1964, expiration date of the maximum sentence for the crime with which he was charged, tried and convicted. (The foregoing statement is limited by date only if the Colorado Sex Offenders Act attacked under [d], above, is declared to be constitutional.)

In *Specht* v. *Tinsley*, Case No. 8288, U. S. D. C. Colo., supra, the Office of the Attorney General of Colorado successfully argued that the Petition for a Writ of Habeas Corpus was premature (Jan. 30, 1964). In the ruling thereon, the Hon. Alfred A. Arraj did state, in pertinent part:

> "Respondent * * * argues, finally, that since petitioner was admittedly subject to sentencing under the Indecent Liberties Statute, which provides for a maximum imprisonment of ten years, his petition here is premature until such time as a ten year period has expired.
>
> "After a consideration of the relevant authorities, we have concluded that respondent's last contention is controlling here. Petitioner, having been convicted of the crime of Indecent Liberties is subject to a sentence of not more than ten years. That period of time has not yet elapsed, and petitioner therefore may not allege that he is *at this time* being illegally detained. * * *." (Emphasis added.)

Under Colorado law, the period of time that petitioner can be held legally *has now elapsed in full*. A ten year sentence in Colorado is served in four years, ten months, and twenty-two days (C. R. S. [fol. 14] '53, 105-4-7 and 105-4-9). Petitioner has no infractions on his record, major or minor, at either the Colorado State Penitentiary or the Colorado State Hospital, nor has he violated any of the Colorado Statutes that could cause him to be legally restrained beyond the date of October 15, 1964, e. g., C. R. S. '53, 105-4-8, 105-4-10, etc.

The Office of the Attorney General argued, before this Honorable Court, in *Specht* v. *Tinsley*, Case No. 8288, supra, that petitioner was admittedly subject to a ten year sentence under the Indecent Liberties Statute and that such sentence would not be served in full until November 23, 1969. This is fallacious reasoning, as petitioner is sure that the Office of the Attorney General of Colorado is cognizant of the "good time" provisions of Colorado laws under a crim-

inal charge. A ten year calendar sentence is served only by those convicted of first-degree murder, kidnapping with harm, and/or habitual criminal. The normal ten year sentence is served in full in the aforementioned four years, ten months, and twenty-two days *without parole* or restriction of any kind, barring an attempt at or escape or attack on prison personnel or inmates. To deny petitioner the "good time" provisions of Colorado Statutes is flagrant violation of equal protection and due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Petitioner exhausted his State's rights relative to the expiration date of his full maximum sentence by filing a Petition for a Writ of Habeas Corpus with the Pueblo County District Court which was docketed as Action No. 48298 and denied by the Court on November 4, 1964. The petitioner thereupon filed a Motion for a New Trial, pursuant to Rule 59, (a), (b), and (f), R. C. P. Colo., which was denied by the Court in due time. Petitioner had sought a Writ of Mandamus relative to this from the Supreme Court of Colorado, filed by his former Mother-in-law, Mrs. Myrtle Moon, under Power of Attorney. This was denied by the Supreme Court on November 12, 1964 (Exhibit B).

Petitioner is, and has been since October 15, 1964, being held under unlawful and illegal restraint by respondents herein. The Writ of Habeas Corpus should issue and petitioner be restored to his immediate and complete freedom.

Petitioner makes the further contention that he has never been legally sentenced under the Colorado Sex [fol. 15] Offenders Act, in which Act provision is definitely made for sentencing under C. R. S. '53, 39-19-5 (1960 Perm. Supp.), this section being entitled: "Sentebce—cost—place of confinement". In the Opinion Below (Exhibit A), it is said, at page 6 thereof:

> "Specht's last argument is * * * that he was only sentenced under its first two sections, rather than the act as a whole. * * * Further, we know

of no requirement that one must be sentenced under an act as a whole."

The Minute Order of Sentence in Criminal Action No. 2667 in the District Court of Jefferson County, State of Colorado, shows that petitioner was sentenced pursuant only to C. R. S. '53, 39-19-1 and 2. Section 1 gives the trial Court the discretion to apply the Sex Offenders Act in lieu of the original charge; Section 2 provides for psychiatric examination before sentence. Neither provides for a definite sentence. The Minute Order of Sentence was Exhibit "A" attached to the Opening Brief of Case No. 20703 in the Colorado Supreme Court. It is the contention of petitioner that he had to be sentenced specifically pursuant to C. R. S. '53, 39-19-5 (1960 Perm. Supp.), or under the Act as a whole in order to be *legally* sentenced.

Petitioner takes issue with the ruling in the Opinion Below (Exhibit A) that there is no requirement that one must be sentenced under an act as a whole. Petitioner is currently in the Colorado State Hospital in Pueblo and, with storage space at a minimum, he is lacking much of the authority he has been able to acquire. However, by reliance on memory, petitioner believes that the case of *House* v. *Mayo*, (citation unknown), rendered approximately in 1939 by the United States Supreme Court, disproves this statement, wherein the High Court of the United States declared that a person could not be sentenced piecemeal under any given statute, act or sections thereof.

Petitioner respectfully submits that he has never been *legally* sentenced under the Colorado Sex Offenders Act, C. R. S. '53, 39-19-1 et seq. (1960 Perm. Supp.), in violation of the guarantee of due process of the Fourteenth Amendment to the United States Constitution. It is but one more reason why the Writ of Habeas Corpus should issue and be made absolute.

12. Petitioner has filed previous petitions for habeas corpus with respect to this conviction.

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application.

[fol. 16]

(a) the specific nature thereof:

i. An action pursuant to the Colorado Rules of Civil Procedure.
ii. Petition for Writ of Habeas Corpus.
iii. Petition for Writ of Habeas Corpus.
iv. Petition for Writ of Error.
v. Petition for Writ of Habeas Corpus.
vi. Motion to Vacate, Set Aside or Correct Sentence and Judgment, Pursuant to Rule 35 (b), Colo. R. Crim. P.
vii. Petition for Writ of Error.
viii. Petition for Writ of Habeas Corpus.
ix. Petition for Writ of Mandamus.

(b) the name and location of the court in which each was filed:

i. Jefferson County District Court, Golden, Colorado.
ii. Jefferson County District Court, Golden, Colorado.
iii. Jefferson County District Court, Golden, Colorado.
iv. Colorado State Supreme Court, Denver, Colorado.
v. United States District Court, Denver, Colorado.
vi. Jefferson County District Court, Golden, Colorado.
vii. Colorado State Supreme Court, Denver, Colorado.
viii. Pueblo County District Court, Pueblo, Colorado.
ix. Colorado State Supreme Court, Denver, Colorado.

(c) the disposition thereof:

i. Ignored as it was an improper procedure.
ii. Denied.
iii. Denied.

iv. Judgment of lower Court affirmed.
v. Denied as premature.
vi. Denied.
vii. Judgment of lower Court affirmed.
viii. Denied.
ix. Denied.

(d) date of each such disposition:

i. Ignored; no date given.
ii. January 15, 1962.
iii. July 13, 1962.
iv. September 30, 1963.
v. January 30, 1964.

[fol. 17]

vi. March 30, 1964.
vii. November 16, 1964.
viii. November 4, 1964.
ix. November 12, 1964.

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. None.
ii. None.
iii. None.
iv. — Colo. —, 385 P. (2d) 423.
v. (Citation unknown). Civil Action No. 8288, U. S. D. C. Colo.
vi. None.
vii. (Citation unknown). Case No. 21260, Supreme Court of Colorado.
viii. None.
ix. None.

(f) did you appeal the judgment entered therein? Yes, as shown by (a) iv, (a) v, (a) vii.

14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed? Yes.

15. If you answered "yes" to (14), identify

(a) which grounds have been previously presented:

i. Grounds 10 (a) through (e).

(b) the proceedings in which each ground was raised:

i. Motion to Vacate, Set Aside or Correct Sentence and Judgment, Pursuant to Rule 35 (b), Colo. R. Crim. P., before the Jefferson County District Court, Golden, Colorado.

ii. On Writ of Error to the Colorado Supreme Court, Denver, Colorado, in Case No. 21260.

iii. (These grounds were presented to the United States District Court, Denver, Colorado, in Civil Action No. 8288, but were not ruled upon as they had not been presented in the same form to the several Courts of Colorado.)

16. Answered by (15).

17. Were you represented by an attorney at any time during the course of

(a) your arraignment and plea? Yes.

[fol. 18]

(b) your trial, if any? Yes.

(c) your sentencing? Yes.

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? No appeal was taken.

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes.

18. If you answered "yes" to one or more parts of (17), list

(a) the name and address of each attorney who represented you:

i. Mr. Victor E. DeMouth, 710 14th Street, Golden, Colorado.
ii. Mr. William D. Swenson, 1340 Denver Club Building, Denver, Colorado.

(b) the proceedings at which each such attorney represented you:

i. Arraignment, plea, trial, and sentencing.
ii. Making the answer brief and oral argument, if any, in Civil Action No. 8288, U. S. D. C. Colo.

19. Petitoner has completed the sworn affidavit setting forth the required information in order to proceed *in forma pauperis* (with the exception of the Five Dollar filing fee, which petitioner is paying).

/s/ Francis Eddie Specht
FRANCIS EDDIE SPECHT
Petitioner

[Duly sworn to by Francis Eddie Specht. (Jurat omitted in Printing).]

[fol. 19]

[Affidavit in Support of Application for Leave to Proceed Without Prepayment of Costs. (Omitted in Printing)]

[fol. 20] EXHIBIT A TO PETITION

NO. 21260

FRANCIS EDDIE SPECHT, PLAINTIFF IN ERROR

v.

THE PEOPLE OF THE STATE OF COLORADO,
DEFENDANT IN ERROR

* * * *

Error to the District Court
of
Jefferson County

Hon. Christian D. Stoner, Judge

EN BANC JUDGMENT AFFIRMED

Plaintiff in Error,
Pro Se

Mr. Duke W. Dunbar, Attorney General,
Mr. Frank E. Hickey, Deputy Attorney General,
Mr. John E. Bush, Assistant Attorney General,
Attorneys for Defendant in Error,

MR. JUSTICE PRINGLE delivered the opinion of the Court.

[fol. 21] The plaintiff in error, Francis Eddie Specht, was convicted of the crime of indecent liberties under CRS '53, 40-2-32, and was sentenced under Chapter 122, Session Laws 1957 [CRS '53, 39-19 (1960 Perm. Supp.)], commonly called the Sex Offenders Act. He seeks reversal of the denial of his motion, pursuant to Rule 35 (b), Colo. R. Crim. P., to vacate, set aside or correct the judgment and sentence.

The information charged that Specht:

> ". . . who was then and there over the age of 14 years, did unlawfully and feloniously entice, allure and persuade a child, namely, . . . who was then and there under the age of 16 years, then and there into an office for the purpose of taking immodest, improper, immoral and indecent liberties with the person of said child; and did then and there unlawfully and feloniously take immodest, improper, immoral and indecent liberties with the person of such child, namely, the said . . .; and did then and there unlawfully and feloniously attempt to take immodest, improper, immoral and indecent liberties with the person of such child, namely, the said . . ."

He pleaded not guilty and the issue thus joined was tried to a jury, which returned a verdict of guilty. The trial court invoked the Sex Offenders Act and sent him to the Colorado Psychopathic Hospital for examination. He was thereafter sentenced to a term of not less than one day nor more than life in the State Penitentiary, under the [fol. 22] Sex Offenders Act. Specht sought and was denied habeas corpus. See *Specht* v. *Tinsley*, —— Colo. ——, 385 P.2d 423. He then filed the motion to vacate, set aside or correct judgment and sentence which is the subject matter here for review.

Specht contends that his constitutional rights have been violated because (1) he was sentenced under the Sex Offenders Act, although he was convicted of violating only CRS '53, 40-2-32; (2) sentencing under the Sex Offenders Act is cruel and unusual punishment within the Eighth Amendment to the United States Constitution and Article II, Section 20 of the Colorado Constitution; (3) Article III of the Colorado Constitution prohibits sentencing under the Sex Offenders Act, because the Sex Offenders Act unlawfully delegates legislative power to the judiciary and unlawfully delegates judicial power to the executive branch (the Parole Board); and (4) sentencing under the Sex Offenders Act violates his rights to equal protection and due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution and Article II, Section 25 of the Colorado Constitution. Despite Specht's assertions to the contrary, these contentions

have all been dealt with and disposed of in the earlier case, *Specht* v. *Tinsley*, *supra:*

[fol. 23] "Specht's several contentions pertaining to the alleged unconstitutionality of this statute have heretofore been considered and rejected by this court. See *Trueblood* v. *Tinsley*, 148 Colo. 503, 366 P.2d 655, where this very statute was held to be constitutional. Specht argues, however, that *Trueblood* v. *Tinsley*, *supra*, is 'erroneous' in that it misconstrues' certain of the cases cited therein. Suffice it to say that we adhere to our holding in the Trueblood case and conclude that CRS '53, 39-19-1 et seq. is not subject to the several constitutional infirmities suggested by Specht."

Specht next argues that one cannot be charged, as he was, with a completed act, and also with an attempt to do that act. It is true that one cannot be found *guilty* of both enticement and attempting to take immodest, immoral and indecent liberties, and enticement and taking immodest, immoral and indecent liberties. *Martinez* v. *People*, 111 Colo. 52, 137 P.2d 690. But nothing in the law prevents the People from *charging* the accused with the two offenses.

Two problems with the information remain: (1) instead of precisely following the statutory language, it charges the taking of "immodest, *improper*, immoral and indecent liberties," (emphasis added) and (2) it charges three offenses in one count. If the word "improper" were stricken, the information would then read precisely in accordance with the statute. Averments which are not necessary to [fol. 24] a sufficient description of the offense may be stricken as surplusage. *State ex rel. Leichner* v. *Alvis*, 114 N.E.2d 861 (Ohio App.). As to Specht's second attack with respect to the form of the information, it is true that the information charged three offenses in one count and was therefore clearly duplicitous. Review on grounds of duplicity is proper only by writ of error to the conviction and not by means of Rule 35, Colo. R. Crim. P. And even on writ of error, an attack on the ground of duplicity is only a matter of form, and must be made

before trial. *Russell* v. *People*, —— Colo. ——, 395 P.2d 16; *Warren* v. *People*, 121 Colo. 118, 213 P.2d 381; Rule 12 (b), Colo. R. Crim. P. The record discloses neither a timely objection, nor that the defendant was misled as to the charges against him.

Specht also argues that the offenses defined in CRS '53, 40-2-32 are not clearly expressed in its title, as required by Article V, Section 21 of the Colorado Constitution. Specht is mistaken in his belief that the words "Assault on a child under sixteen" as a headnote to the pertinent section of the statute in CRS '53 constitute its title for the purposes of Article V, Section 21. The Constitution refers to the title of a bill as it is presented to the legis- [fol. 25] lature. The headnote to CRS '53, 40-2-32 has no relation to that title. Even if the title to the bill had been defective, the passage by the legislature of the official report of the committee on statutory revision, creating Colorado Revised Statutes 1953, cured any defect, because the statute as re-enacted was thereafter, alone the law. *Tinsley* v. *Crespin*, 137 Colo. 302, 324 P.2d 1033; CRS '53, 135-4-2.

Specht's last argument is that he was never informed by the Court of the possibility that he might be sentenced under the Sex Offenders Act, and that he was only sentenced under its first two sections, rather than under the act as a whole. We know of no requirement that a defendant be advised by the Court of the possible sentence when he pleads *not* guilty. Further, we know of no requirement that one must be sentenced under an act as a whole.

The judgment is affirmed.

MR. JUSTICE HALL not participating.

[fol. 26] EXHIBIT B TO PETITION

Clerk's Office

SUPREME COURT
STATE OF COLORADO
DENVER, 80202

November 12, 1964

Filed, United States District Court, Denver, Colorado, Mar. 31, 1965

G. WALTER BOWMAN, Clerk

Mrs. Myrtle Moon,
1176 So. Lincoln St.,
Denver, Colorado 80210

Dear Madam:

The motion of Francis Eddie Specht for leave to proceed in forma pauperis, presented by you, in the above numbered and titled case, was granted today. The petition for a writ of mandamus in the case was denied and the case ordered dismissed.

The court has instructed me to advise you that no person is allowed to appear for another in this court unless duly licensed to practice law in the State of Colorado, even though such person may have a power of attorney. Anyone so attempting to proceed without a license to practice law is subject to being held in contempt of court.

Yours very truly,

/s/ George A. Trout
(GEORGE A. TROUT)
Clerk.

GAT/eo
cc: Attorney General

[fol. 27] EXHIBIT C TO PETITION

IN THE DISTRICT COURT:

STATE OF COLORADO,)
) ss.
County of Jefferson)

No. 2667

Filed in the District Court of Jefferson County, Colorado
Aug. 20, 1959

* * * *

THE PEOPLE OF THE STATE OF COLORADO)
vs.) VERDICT
FRANCIS EDDIE SPECHT, DEFENDANT)

We, the Jury, duly empaneled and sworn in the above entitled cause find the Defendant, Francis Eddie Specht, guilty as charged.

/s/ William N. Brown
Foreman.

* * * *

[fol. 29] EXHIBIT D TO PETITION

Clerk's Office

SUPREME COURT
STATE OF COLORADO
DENVER 80203

December 14, 1964

Case No. 21260

SPECHT

v.

THE PEOPLE

* * * *

The Honorable Duke W. Dunbar,
Attorney General,
State Capitol,
Denver, Colorado.

Mr. Francis Eddie Specht,
Ward 71, Colorado State Hospital,
Pueblo, Colorado. 81003

Gentlemen:

The following proceedings were this day had in the above numbered and titled case:

The petition for rehearing was denied.
Remittitur issued.

Yours very truly,

GEORGE A. TROUT,
Clerk.

By /s/ Florence Walsh
Deputy Clerk.

[fol. 30]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 9082

[File Endorsement Omitted]

[Title Omitted]

SHOW CAUSE ORDER—March 31, 1965

To the above-named respondent, GREETINGS:

Whereas, a verified application for writ of habeas corpus in due form has been filed by the petitioner alleging that he is being held illegally by you; and

Whereas, upon reading the petition good cause appears:

NOW, THEREFORE, IT IS ORDERED that you, the respondent above-named, show cause by a return in writing on or before twenty days from date hereof why the petition for a writ of habeas corpus should not be granted, which said return shall be filed with the Clerk of this Court at the Post Office Building, Denver, Colorado.

It is further ORDERED that the petitioner shall, on or before ten days after the filing and serving of the return by the respondent, file a traverse to the return.

It is further ORDERED that the petitioner remain in custody and within the jurisdiction of this Court until its further order herein.

DATED at Denver, Colorado, this 31st day of March, 1965.

BY THE COURT:

/s/ Alfred A. Arraj
ALFRED A. ARRAJ
Chief Judge.

[fol. 31]

PETITION FOR WRIT OF HABEAS CORPUS
UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Civil Action No. 9082

[File Endorsement Omitted]

[Title Omitted]

MOTION TO AMEND PETITION FOR WRIT OF HABEAS CORPUS—Filed April 13, 1965

To: THE HONORABLE ALFRED A. ARRAJ, CHIEF JUDGE, UNITED STATES DISTRICT COURT

COMES NOW the petitioner, pro se and *in forma pauperis*, in the above-entitled and numbered cause, and respectfully moves this Honorable Court for leave to amend the Petition for Writ of Habeas Corpus filed herein as shown below, for the sake of clarity.

Page 17 of the Petition for Writ of Habeas Corpus, No. 15 (b), should be amended to read:

15. (b)

iv. Ground 10 (e) was raised in a Petition for Writ of Habeas Corpus to the Pueblo County District Court in Action No. 48298.

v. Ground 10 (e) was raised in a Petition for a Writ of Mandamus in the Colorado State Supreme Court, action unnumbered (Exhibit B).

WHEREFORE, petitioner prays that this Honorable Court grant the Motion to Amend Petition as shown above to become a part of the record herein.

Respectfully submitted,

/s/ Francis Eddie Specht
FRANCIS EDDIE SPECHT
Petitioner, Pro Se

Mailing address:

Ward 71
Colorado State Hospital
Pueblo, Colorado 81003

Dated: April 12, 1965

cc: Hon. Duke W. Dunbar
Attorney General of the State of Colorado
104 State Capitol Building
Denver, Colorado 80203

[fol. 32]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 9082

[File Endorsement Omitted]

[Title Omitted]

ANSWER TO ORDER TO SHOW CAUSE—Filed April 20, 1965

COME NOW the respondents by their attorney Duke W. Dunbar, Attorney General of the State of Colorado, and pursuant to order of this Court show cause as follows why the petition should be denied:

ANSWER

1. Admit paragraphs 1, 2, 3, 4, 5, 6, 7, 12, 14, 17 and 18.

2. Deny paragraphs 9, 10 and 15.

3. Are without sufficient information to form a belief as to the truth or falsity of sub-paragraphs i, viii and ix of sub-paragraphs (a) through (f) of paragraph 13, affirmatively allege that the date of disposition of 13(d)(ii) is March, 1962, and of 13(d)(iii) is November 28, 1962, and admit the balance of paragraph 13.

4. The allegations of the petition not specifically denied are hereby denied.

ARGUMENT

The prior disposition of petitioner's petition is res judicata. Petitioner attempts to avoid the effect of this [fol. 33] Court's previous ruling by alleging that he is now entitled to his discharge. Such conclusion is premised upon his claimed right to good time and trusty time under Colorado statute. Firstly, such question is a matter of state law, over which this Court has no jurisdiction to

determine, and, secondly, his conclusion is erroneous. Petitioner has no fixed right to such credits. *Glass* v. *Tinsley*, —— Colo. ——, 388 P. 2d 249. This Court's prior determination, therefore, is dispositive of the petition.

The remaining legal questions raised have been previously determined and disposed of adversely to the petitioner and require no further response. *Trueblood* v. *Tinsley*, 148 Colo. 503, 366 P. 2d 655; *Trueblood* v. *Tinsley*, 10th Cir., 316 F. 2d 783; Cert. denied 370 U. S. 929; *Vanderhoof* v. *People*, —— Colo. ——, 380 P. 2d 903; *Specht* v. *Tinsley*, —— Colo. ——, 385 P. 2d 423; *Specht* v. *People*, —— Colo. ——, 396 P. 2d 838. The petition must, therefore, be denied.

Respectfully submitted,

DUKE W. DUNBAR
Attorney General

By /s/ John E. Bush
JOHN E. BUSH
Assistant Attorney General

[Certificate of Mailing (Omitted in Printing)]

[fol. 34]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 9082

[File Endorsement Omitted]

[Title Omitted]

TRAVERSE OF RETURN TO ORDER TO SHOW CAUSE
—Filed April 30, 1965

COMES NOW the petitioner, pro se and *in forma pauperis*, and respectfully makes reply to the Return to Order to Show Cause in the above-captioned action. Petitioner shows unto the Court as follows:

REPLY

1. Respondents are not in any position to deny the allegation of Paragraph 9 of the Petition for Writ of Habeas Corpus as this was a fact known only to the petitioner, his counsel, and his then-wife.

2. The several Courts of Colorado have failed to adjudicate the Federal Constitutional questions raised in the Petition for Writ of Habeas Corpus; the allegations raised are not res judicata in any sense of the word.

3. The allegations of the Answer to Order to Show Cause not specifically denied are hereby denied.

ARGUMENT

Paragraph 1 of the Answer makes a denial of a fact that only the petitioner, his counsel, and his then-wife were in a position to know. It was not argued in Court orally nor in any other fashion.

It is respectfully submitted that the trial Court did not have jurisdiction to sentence the petitioner pursuant to C. R. S. '53, 39-19-1 et seq. (1957 Cum. Supp., in effect at time of sentencing).

The Argument in the Answer to Order to Show Cause makes the claim that petitioner's petition is res judicata by the prior disposition of this Court and/or the several Courts of Colorado. Petitioner admits that the disposition by this Honorable Court in Civil Action No. 8288, U. S. [fol. 35] D. C., Colo. was determinative *at that time* as being premature, but that the action, by the passage of more than the proper amount of time, is no longer premature but is derelict by a period of more than six months as of this writing. In response to respondents' first paragraph of Argument, petitioner contends that this Honorable Court does have jurisdiction to hear and/or decide Federal Constitutional questions, contrary to the claims of respondents.

Glass v. *Tinsley*, —— Colo. ——, 388 P. (2d) 249, is not a point in fact with the issues in this proceeding. In fact, it is the very antithesis of the argument propounded by petitioner in his Petition for Writ of Habeas Corpus, at pages 13 and 14 thereof. *Glass* v. *Tinsley*, supra, is a case involving an escapee, which petitioner pointed out with particularity does not apply to this cause.

The final paragraph of the Argument of the Answer to Order to Show Cause makes claim that the remaining legal questions—Paragraphs 10 (a), (b), (c) and (d), and the supporting argument in Paragraphs 11 (a), (b), (c) and (d)—have been previously determined and disposed of adversely to petitioner and require no further response. The several Courts of Colorado have never arrived at a decision relative to the Federal Constitutional questions raised by petitioner; if they had, this action would not be before this Honorable Court. Petitioner calls attention to the citations on Page 2 of the Answer to Order to Show Cause and makes the allegation that none of these cases are determinative of the important Federal Constitutional questions raised by petitioner. Petitioner makes the claim that cases at point that completely refute the allegations of respondents will be found in *Minnesota* v. *Probate Court*, 309 U. S. 270, 60 S. Ct. 523, 84 L. Ed. 744, 126 A. L. R. 530; *People* v. *Chapman*, 301 Mich. 584, 4 N. W. (2d) 18; *People* v. *Frontczak*, 286 Mich. 51, 281 N. W. 534; *State ex rel. Sweezer* v. *Green*, 360

Mo. 1249, 232 S. W. (2d) 897, 24 A. L. R. (2d) 340; *People* v. *Redlich*, 402 Ill. 270, 83 N. E. (2d) 736; *Re Moulton*, 96 N. H. 370, 77 A. (2d) 26; *Application of Keddy*, 105 Cal. App. (2d) 215, 233 P. (2d) 159; and *Malone* v. *Overholzer*, (D. C. Dist. Col.) 93 F. Supp. 647. These cases also support fully the contentions of petitioner.

In reply to respondents' Answer to Order to Show Cause, your petitioner reinstates his filed habeas corpus allegations in this cause, which are made a part hereof, as if appearing hereat in full and to which reference is respectfully prayed.

Petitioner has been put to proof by the Answer to Order to Show Cause by the respondents herein and is ready at the proper time with his proofs, all in accordance to law on such matters when the proper hearing is held.

[fol. 36] Petitioner respectfully submits that the Writ of Habeas Corpus should issue, be made absolute, and petitioner restored to his rightful freedom.

Respectfully submitted,

/s/ Francis Eddie Specht
FRANCIS EDDIE SPECHT
Petitioner, Pro Se

Mailing address:

Ward 71
Colorado State Hospital
Pueblo, Colorado 81003

[Certificate of Mailing (Omitted in Printing)]

[fol. 37]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 9082

[File Endorsement Omitted]

FRANCIS EDDIE SPECHT, PETITIONER

v.

WAYNE K. PATTERSON, Warden, Colorado State Penitentiary, and/or DR. CHARLES E. MEREDITH, Supt., Colorado State Hospital, RESPONDENTS

MEMORANDUM DENYING PETITION FOR WRIT OF HABEAS CORPUS—July 21, 1965

This matter is before the Court on a petition for a writ of habeas corpus and on a motion for leave to proceed without prepayment of costs. A show cause order was issued and counsel appointed to assist petitioner. Having heard oral argument by counsel, having examined the file and being fully advised in the premises, the Court is of the opinion that the motion for leave to proceed without prepayment of costs must be granted and that the petition for a writ of habeas corpus should be denied.

It appears from the petition that petitioner is presently incarcerated in the Colorado State Hospital, Pueblo, Colorado, having been transferred there from the Colorado State Penitentiary, Canon City, Colorado, on May 4, 1964. Petitioner was found guilty by a jury upon a plea of not guilty to the offense of indecent liberties in the District Court in and for the County of Jefferson, Colorado. Sentence of not less than one day nor more than life was imposed on November 23, 1959, pursuant to the Colorado Sex Offenders Act.

[fol. 38] No direct appeal of this sentence was ever taken. Thereafter, petitioner filed an action in the trial

court pursuant to the Colorado Rules of Civil Procedure, which was ignored. On January 15, 1962, petition for a writ of habeas corpus was brought and denied by the state court, along with petitioner's request for a transcript for appeal. On July 13, 1962, a second petition for a writ of habeas corpus was brought and denied, along with another request for a free transcript. He, however, through friends was able to purchase a copy of the record, but on appeal of the second denial judgment of the trial court was affirmed. Specht v. Tinsley, 385 P. 2d 423 (Colo. 1963). A petition for a writ of habeas corpus was denied by this Court in Civil Action No. 8288 on January 30, 1964. Subsequently, a motion was made pursuant to Rule 35(b), Colorado Rules of Criminal Procedure, to vacate and set aside the judgment and sentence. This motion was denied by the trial court and affirmed by the Colorado Supreme Court in Specht v. People, 396 P. 2d 838 (Colo. 1964). Rehearing of this determination was denied by the Colorado high court on December 14, 1964.

The basic contention of the petition is that the Colorado Sex Offenders Act is unconstitutional. Petitioner alleges that sentencing under the Act constitutes cruel and unusual punishment prohibited by the Eighth Amendment of the United States Constitution, and that the Act itself is violative of the Fourteenth Amendment of the United States Constitution due process and equal protection provisions. These contentions have been considered quite thoroughly by the state courts in this and other cases. [fol. 39] Petitioner attempted to have this Court pass upon them in his prior habeas corpus petition. However, his petition was denied as being premature, for he was admittedly subject to a maximum ten year sentence under the Indecent Liberties Statute, which period had not then expired.

Ten years of his sentence have not now expired either. He seeks to persuade the Court that under the state system of accrediting "good time", he would now be eligible for release under a ten year sentence, therefore the constitutional questions are "ripe". An answer to the "good time" question requires a specific conclusion that "good time" is either a matter of "right" or is a "privilege".

This characterization we believe is clearly one for the state to make. We specifically decline to answer the question, but pass to the merits of the controversy anyway, because we believe that to be the most equitable manner in which to proceed in this particular case.

Although the arguments made by petitioner are not totally unpersuasive, we feel bound by the Circuit Court decision in Trueblood v. Tinsley, 316 F. 2d 783 (1963). The argument is made here that in Trueblood the Court did not specifically pass upon the constitutional attacks herein levied at the Colorado Sex Offenders Statute. We cannot say that we are in total disagreement with this conclusion of petitioner, but when we read Trueblood along with Trueblood v. Tinsley, 148 Colo. 503, 366 P. 2d 655 (1961) cert. den. 370 U.S. 929 (1962) cited therein, we believe that the constitutionality of the Colorado Sex Offenders Act has been determined. It is therefore,

[fol. 40] ORDERED that the motion for leave to proceed without prepayment of costs be, and the same hereby is, granted, and it is further

ORDERED that the petition for a writ of habeas corpus be, and the same hereby is, denied.

DATED at Denver, Colorado, this 21st day of July 1965.

BY THE COURT:

/s/ Alfred A. Arraj
ALFRED A. ARRAJ
Chief Judge
United States District Court

* * * *

[fol. 41]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 9082

[File Endorsement Omitted]

[Title Omitted]

NOTICE OF APPEAL TO THE CIRCUIT COURT OF THE UNITED STATES, TENTH CIRCUIT—Filed Aug. 10, 1965

COMES NOW the petitioner above-named, Francis Eddie Specht, Case Number 42871, Colorado State Hospital (register Number 32140, Colorado State Penitentiary), appearing Pro Se and In Forma Pauperis, and respectfully serves notice of appeal to the Circuit Court of the United States, Tenth Circuit, from an adverse decision of this Honorable Court by the Honorable Alfred A. Arraj, rendered on July 21, 1965.

Petitioner gives Notice of Appeal pursuant to 28 U. S. C. A. § 2106, and U. S. C. § 2255. Following is pertinent information relative to this cause:

The respondents are named in the caption, above; they will be referred to as respondent(s) where necessary. Petitioner was originally charged, tried and convicted in Criminal Action No. 2667 in the Jefferson County District Court, State of Colorado, before the Hon. Marshall Quiat. Conviction was by a jury on the charge of Indecent Liberties, pursuant to C. R. S. '53, 40-2-32. Petitioner was sentenced on November 23, 1959, pursuant to the so-called Colorado Sex Offenders Act, under C. R. S. '53, 39-19-1 and 2, as Amended (and as shown in the Minute Order of Sentence) and a sentence of one day to life was imposed. No appeal of the original sentence was ever taken.

Petitioner filed an improper action pursuant to the Colorado Rules of Civil Procedure, which was ignored. A Petition for Writ of Habeas Corpus was brought and denied by the State Court on January 15, 1962. A request

for a free transcript of the proceedings was denied. A second petition for Habeas Corpus was brought on July 13, 1962, and denied by the State Court. A second request for a free transcript was also denied but friends assisted the petitioner with small funds so that he was able to make the appeal to the Colorado Supreme Court. The [fol. 42] judgment of the lower Court was affirmed in *Specht* v. *Tinsley*, —— Colo. ——, 385 P. (2d) 423. A Petition for Writ of Habeas Corpus was denied by this Honorable Court in Civil Action No. 8288 on January 30, 1964.

Petitioner made a Motion pursuant to Rule 35 (b), Colo. R. Crim. P., to vacate and set aside the judgment and sentence, said Motion being denied by the trial Court and affirmed by the Colorado Supreme Court in *Specht* v. *People*, —— Colo. ——, 396 P. (2d) 838. Petition for Re-Hearing was denied by the Colorado Supreme Court on December 14, 1964. Petitioner then filed a Petition for a Writ of Habeas Corpus with the District Court of the United States for the District of Colorado, with the results as heretofore given in the first paragraph.

Petitioner was represented at arraignment, trial, and sentencing by the Hon. Victor E. DeMouth of Golden, Colorado. Petitioner has appeared Pro Se in all other actions instituted and sued out, with the exception of the appointment of the Hon. William D. Swenson, 1340 Denver Club Bldg., Denver, Colorado in Case No. 8288 in this Court, and the appointment of the Hon. Michael A. Williams, 1900 First Natl. Bank Bldg., Denver, Colorado, in Case No. 9082 in this Court. Mr. Williams has expressed a willingness to appear for petitioner in the Tenth Circuit Court if the Notice of Appeal is granted to petitioner. Petitioner seeks to proceed herein *in forma pauperis*, with the exception of paying the filing fee for notice of appeal; an affidavit, believed to be proper in form, is attached hereto.

The opinion of Judge Arraj in Civil Action No. 9082 is unreported as yet or, at least, is unknown to the petitioner.

Petitioner respectfully requests that this Honorable Court furnish him the following papers filed in this cause for the purpose of appeal to the Circuit Court of the United States, Tenth Circuit, *in forma pauperis:*

Petition for Writ of Habeas Corpus.
Order Appointing Attorney.
Answer to Order to Show Cause.
Motion to Amend Petition for Writ of Habeas Corpus.
Show Cause Order.
Affidavit in Support of Application for Leave to Proceed Without Prepayment of Costs.
Copy of Memorandum Opinion and Order.
Order of Court of July 21, 1965.
Certificate of Probable Cause.

Petitioner herein alleges that he has been denied the guarantees of the First Section of the Fourteenth Amendment to the Constitution of the United States pertaining [fol. 43] to the guarantees of Due Process and Equal Protection of the Laws. The questions involving the alleged violations have been presented to the several Courts of Colorado and to this Honorable Court. Petitioner herein respectfully submits that this Honorable Court erred in its Opinion of July 12, 1965, in this cause as follows:

1) The Court should have taken jurisdiction of the "good time" question presented instead of having left this to the determination of the State Courts. In an analagous case, *U. S. ex rel. Howard* v. *Ragen*, 59 F. Supp. 374, a case involving parole violation, the Court not only accepted jurisdiction of the cause, but excoriated the State Courts for their failure to obaserve the mandate of due process as denied to the petitioner therein. When hundreds of men serving a ten year sentence in Colorado (served in 4 years, 10 months, and 22 days) have been automatically released at the expiration of this period of time without ever seeing the Parole Board, it is patent that equal protection of the laws has been denied petitioner.

2) Petitioner respectfully submits that neither *Trueblood* v. *Tinsley*, 316 F. 2d 783 (1963), nor *Trueblood* v. *Tinsley*, 148 Colo. 503, 366 P. (2d) 655 (1961) is determinative of the issues presented relative to the constitutionality of the Colorado Sex Offenders Act in this cause; *Minnesota* v. *Probate Court*, 309 U. S. 270, 60 S. Ct. 523, 84 L. Ed. 744, 126 A. L. R. 530 (1940), was relied on in *Trueblood* v. *Tinsley*, (Colo.) supra, as estab-

lishing the constitutionality of the Colorado Sex Offenders Act as a "similar" statute; that *Minnesota* v. *Probate Court*, supra, is actually determinative of the issues as presented by petitioner's contentions but on a "dissimilar" and not a "similar" basis in a comparison of the two sets of statutes; that full due process and equal protection of the laws is afforded a person in Minnesota, but only provisions for procedure and no protection of due process nor equal protection of the laws is afforded a person coming within the purview of C. R. S. '53, 39-19-1 et seq., as Amended.

3) Petitioner alleges that this Honorable Court erred by failure to rule on the question whether sentencing under the Colorado Sex Offenders was violative of the Eighth Amendment to the United States Constitution. The Court dismissed this with the mention that "These contentions have been considered quite thoroughly by the *state* courts in this and other cases". (Emphasis mine.) Petitioner feels that this Honorable Court should have decided this point in the light of Federal rulings, especially *Robinson* v. *State of California*, 82 S. Ct. 1417 (1962).

In view of the foregoing, petitioner respectfully asserts [fol. 44] that good cause is shown for appeal to the United States Circuit Court of Appeals, Tenth Circuit, and petitioner respectfully requests that this Honorable Court grant that he be allowed to appeal to the Tenth Circuit Court of Appeals *in forma pauperis*.

Submitted in good faith,

/s/ Francis Eddie Specht
FRANCIS EDDIE SPECHT
Petitioner
Attorney Pro Se

Mailing address:

Ward 71
Colorado State Hospital
Pueblo, Colorado 81003

[Duly Sworn to by Francis Eddie Specht
(Jurat Omitted in Printing)]

[fol. 45]

[Motion and Affidavit in Forma Pauperis for Leave to File Appeal Without Prepayment of Fees (Omitted in Printing)]

[fol. 47]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[File Endorsement Omitted]

[Title Omitted]

CERTIFICATE OF PROBABLE CAUSE—Aug. 23, 1965

THIS COURT, in the above-entitled proceedings, has rendered an Order denying the petition for writ of habeas corpus.

The Court certifies that there is probable cause for an appeal.

DATED at Denver, Colorado, this 23rd day of August, 1965.

BY THE COURT:

/s/ Alfred A. Arraj
ALFRED A. ARRAJ
Chief Judge

* * * *

[fol. 48]

[Order Granting Leave to File Appeal in Forma Pauperis (Omitted in Printing)]

[fol. 49]

[Clerk's Certificate (Omitted in Printing)]

[fol. 50]

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ORDER GRANTING APPELLANT LEAVE TO APPEAL IN FORMA PAUPERIS—Oct. 14, 1965

* * * * *

Before Honorable Alfred P. Murrah, Chief Judge.

This cause came on to be heard on the application of appellant for leave to docket the cause and to prosecute the appeal herein as a poor person.

On consideration whereof, and for good cause shown, it is ordered that the said application be and the same is hereby granted and that appellant may docket the cause instanter, which is accordingly done, and prosecute the appeal without being required to prepay fees or costs or to give security therefor.

It is further ordered that appellant be and he is hereby granted leave to have the appeal considered upon a certified type written transcript of the record and typewritten copies of his brief.

It now appearing that the appellant is a poor person and unable to employ counsel, it is further ordered that Michael A. Williams, Esquire, be and he is hereby designated and assigned as counsel for appellant to prosecute the appeal in this cause.

On October 14, 1965, a transcript of the record from the United States District Court for the District of Colorado was filed in the office of the Clerk of the United States Court of Appeals for the Tenth Circuit, a copy of such record is incorporated herein and made a part hereof by reference.

[fol. 51]

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

* * * *

ARGUMENT AND SUBMISSION—Jan. 7, 1966

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable John C. Pickett and Honorable Oliver Seth, Circuit Judges.

This cause came on to be heard and was argued by counsel, Michael A. Williams, Esquire, appearing for appellant, John W. Moore, Esquire, appearing for appellee. Thereupon this cause was submitted to the court.

[fol. 52]

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

* * * *

Appeal from the United States District Court
for the District of Colorado

OPINION—Feb. 21, 1966

Michael A. Williams (Gary L. Greer with him on brief) for Appellant.

John E. Bush (Duke W. Dunbar, Attorney General, and Frank E. Hickey with him on brief) for Appellees.

Before MURRAH, Chief Judge, PICKETT and SETH, Circuit Judges.

MURRAH, Chief Judge

[fol. 53] In this habeas corpus proceedings originating in the Colorado Court the petitioner challenges the constitutionality of his state imposed indeterminate sentence as a sex offender in accordance with Colorado Revised Statutes, 1963, § 39-19-1 et seq. The trial court sustained the constitutionality on the basis of prior adjudications of the Colorado Supreme Court and this court in Trueblood v. Tinsley, 316 F.2d 783.

The state readily concedes that petitioner's state remedies have been exhausted and the asserted due process and equal protection issues are open for consideration here if a decision in petitioner's favor would result in his immediate release. See McNally v. Hill, 293 U.S. 131; McGann v. Taylor, 289 F.2d 820. It is suggested, however, that even if his sentence imposed under the Colorado Sex Offender Act be adjudged invalid, he is yet subject to sentence by the Colorado court on his conviction of indecent liberties under § 40-2-32 for a term not to exceed ten years; that he has not served this term and would not therefore be entitled to his immediate release upon a favorable decision.

The conclusive answer is that his sentence was imposed in lieu of the authorized sentence of not more than ten years. While failure of the sentence he is now serving might subject him to resentence under 40-2-32, no such [fol. 54] sentence has been imposed and a favorable decision on the asserted issue would result in his immediate release on the only sentence he is now serving.

The Colorado Sex Offender Act, 39-19-2, provides in substance that no person convicted of a crime punishable in the discretion of the court under the Act shall be sentenced until a psychiatric examination has been made and a report submitted to the court of all the facts and findings together with recommendations as to whether the convicted person is treatable under the provisions of the Act and whether he should be committed or could be adequately supervised on probation. The statute does not provide or contemplate any hearing on the exercise of the discretion of the court to impose sentence under the Act in lieu of sentence authorized under 40-2-32.

On the constitutional issue the contention is to the effect that one convicted of a 40-2-32 offense is entitled to a due process hearing on the exercise of the discretion committed to the sentencing court. The constitutionality of the Act as applied to this petitioner has been twice sustained in the Colorado Supreme Court, see Specht v. People, 396 P.2d 838; Specht v. Tinsley, 385 P.2d 423. As applied to others similarly situated, it has been sustained in Trueblood v. Tinsley, 366 P.2d 655; Vanderhoof v. [fol. 54a] People, 380 P.2d 903; Sutton v. People, 397 P. 2d 746. The same contention was also before this court and decided against the petitioner in Trueblood v. Tinsley, 316 F.2d 783. Similar statutes applied under similar circumstances have also been sustained by other state courts, i.e. by the Oregon Supreme Court in State v. Dixon, 393 P.2d 204; by the Wisconsin Supreme Court in State v. Haas, 58 N.W.2d 577. The classification of this type of offender for specialized treatment has been authoritatively sustained in Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270. Our case is quite different from People v. Frontczak, 281 N. W. 534, where the condemned statute authorized confinement in addition or supplementary to the sentence imposed for the overt act offense.

We uphold the constitutionality of the Act and agree with the reasoning of the Wisconsin court in State v. Haas, supra, that petitioner was "afforded all the rights of due process at the time of trial. He was afforded the right to be heard himself and by counsel, to be advised of the nature of the charge against him, to meet the witnesses face to face and compel the attendance of witnesses in his own behalf, and to a speedy trial by an impartial jury. But, upon conviction, he is subject to whatever loss of liberty the legislature has prescribed for his crime * * *"

"There are sound practical reasons", says Mr. Justice [fol. 55] Black, "for different evidentiary rules governing trial and sentencing procedure * * *." Williams v. New York, 337 U.S. 241. In determining whether a convicted person shall receive an indeterminate sentence based upon a recognized classification or a ten year maximum sentence, the sentencing court is free to utilize investiga-

tional techniques unhampered by due process requirements. "The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due process clause would hinder if not preclude all courts—state and federal—from making progressive efforts to improve the administration of criminal justice." Williams v. New York, supra; see also Leland v. Oregon, 343 U.S. 790.

As a distinguished psychiatrist has recently said, "Proper management of a mentally disordered offender must take account of his particular problems and needs as well as those of society." [1] It is at the point of sentencing in the judicial process that psychiatry plays its most helpful role as an aid to the court, and it is at this point that the battle of the experts is the least desirable. See Wion v. United States, 337 F.2d 230.

The judgment is affirmed.

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[1] See Dale C. Cameron, M.D., Superintendent, St. Elizabeths Hospital, Wash., D.C., "Did He Do It? If So, How Shall He Be Managed?", Federal Probation, June 1965, Administrative Office of the United States Courts.

[fol. 56]

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JUDGMENT—Feb. 21, 1966

* * * *

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

[fol. 57]

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR REHEARING—Filed March 7, 1966

STATEMENT

This is a petition for rehearing en banc brought by Appellant Francis Eddie Specht. This Court, in a decision entered February 21, 1966, affirmed a judgment of the United States District Court for the District of Colorado denying appellant's petition for habeas corpus and sustaining the constitutionality of his state imposed indeterminate sentence as a sex offender in accordance with Colorado Revised Statutes, 1963, § 39-19-1 et seq.

PETITION

Pursuant to Tenth Circuit Rule 24 Appellant Specht respectfully petitions and requests that the appeal in this

No. 8433 be reheard by the Court en banc, and as grounds therefor briefly states the following:

(1) This Court's decision of February 21, 1966 erroneously sustained the constitutionality of the Colorado Sex Offender Act, 39-19-1 et seq.

(2) The case of *Minnesota ex rel. Pearson* v. *Probate Court*, 309 U.S. 270, relied upon by the Court in affirming the judgment below, sets standards of procedural safeguards against unconstitutional imprisonment, see Appellant's Brief, p. 15, which the Colorado statute does not meet. Cf., Opinion of the Court, Adv. Sheet, p. 3 (Feb. 21, 1966). Valid statutes from Oregon and Wisconsin cited as similar to the Colorado statute do provide for the judicial procedure lacking in the Colorado statute.

[fol. 58] (3) This Court erroneously treated Appellant's argument as an attack on the doctrine that the trial judge has discretion in determining the length of sentence within the minimum and maximum limits set by the legislature in defining a crime and prescribing punishment therefor.

(4) The Court has not considered and disposed of Appellant's contention, to wit:

> When a defendant is charged and convicted of a crime carrying a maximum sentence of ten years, he may not constitutionally be sentenced under a different statute prescribing a maximum term of life imprisonment unless he is brought within the purview of the second statute by a judicial procedure incorporating due process of law.

(5) The Court correctly decided that dangerous sex offenders may be classified for special treatment and that such classification consists with equal protection of the law. But the Court erroneously concluded that this crucial classification, which under the Colorado statute may result in a term of restraint of the person longer than that authorized for the original offense charged, may be made in the absence of a judicial proceeding and the traditional procedural safeguards embodied in due proc-

ess of law which would enable the defendant to confront and rebut the evidence used to bring him within the classification and under the jeopardy of a heavier sentence. Although the classification made by the Colorado statute does not violate equal
[fol. 59] protection, the trial court's function is to make a finding of fact, not to determine the classification. See *Vanderhoof* v. *People*, 152 Colo. 147, at 149, 380 P. 2d 903 (1963). The fact finding process should be subject to procedural safeguards inherent in the adversary system of justice even though the subsequent administration of a sentence may be non-judicial.

CERTIFICATE OF COUNSEL

Counsel for appellant hereby certify that this petition is made in good faith as to its merit and is not made vexatiously or for delay.

/s/ Michael A. Williams
/s/ Gary L. Greer
MICHAEL A. WILLIAMS
GARY L. GREER
Attorneys for Appellant

[Certificate of Service (Omitted in Printing)]

[fol. 60]

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ORDER DENYING PETITION FOR REHEARING EN BANC —March 23, 1966

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable John C. Pickett, Honorable David T. Lewis, Honorable Jean S. Breitenstein, Honorable Delmas C. Hill and Honorable Oliver Seth, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein en banc and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition for rehearing en banc be and the same is hereby denied.

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ORDER DENYING PETITION FOR REHEARING —March 23, 1966

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable John C. Pickett and Honorable Oliver Seth, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

NOTE RE MANDATE

[On April 6, 1966, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court for the District of Colorado.]

[fol. 61]

[Clerk's Certificate (Omitted in Printing)]

[fol. 62]

SUPREME COURT OF THE UNITED STATES

No. 280 Misc., October Term, 1966

FRANCIS EDDIE SPECHT, PETITIONER

v.

WAYNE K. PATTERSON, WARDEN, ET AL.

On petition for writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—December 5, 1966

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 831 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 241773 486